Supreme Court, U.S.
FILED

No. 97-1941 MAY 28 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1997

STAFFORD J. COOLBAUGH,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI

JOHN EMRY, ESQUIRE
Counsel of Record
62 W. Jefferson Street
Franklin, IN 46131-2311
(317) 736-5800
Attorney for Petitioner

Appellate Service: Curry & Taylor (800) 222-8738

61 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, FOR PURPOSES OF THE AMERICANS WITH DISABILITIES ACT, 42 USC §§12131 TO 12133, A STATE CAN IMPOSE ON AN OTHERWISE QUALIFIED INDIVIDUAL WITH A DISABILITY WITH A VALID OUT-OF-STATE DRIVING LICENSE CRITERIA FOR OBTAINING A LICENSE TO DRIVE NOT IMPOSED ON NONDISABLED INDIVIDUALS SEEKING A STATE LICENSE TO DRIVE BASED ON AN OUT-OF-STATE LICENSE.

II. WHETHER LOUISIANA MADE THE INDIVIDUALIZED INQUIRY REQUIRED BY SCHOOL BOARD OF NASSAU COUNTY, FLORIDA V. ARLINE WHEN IT REQUIRED APPELLANT TO ESTABLISH BY A DRIVING TEST AND A MEDICAL STATEMENT THAT HE WAS NOT A THREAT TO THE HEALTH AND SAFETY OF OTHERS.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutes and Rules Involved in this Case 1

Statement of the Case 5

Reasons for Granting the Writ 6

I. THE FIFTH CIRCUIT'S OPINION ALLOWS LOUISIANA TO IMPOSE WITHOUT ANY BASIS IN FACT OR LAW CRITERIA FOR OBTAINING A LOUISIANA DRIVING LICENSE ON AN OTHERWISE QUALIFIED INDIVIDUAL WITH A DISABILITY THAT IT DOES NOT IMPOSE ON NONDISABLED INDIVIDUALS. 6

II. LOUISIANA DID NOT MAKE THE INDIVIDUALIZED INQUIRY REQUIRED BY SCHOOL BOARD OF NASSAU COUNTY, FLORIDA V. ARLINE WHEN IT REQUIRED APPELLANT TO ESTABLISH BY A DRIVING TEST AND A MEDICAL STATEMENT THAT HE WAS NOT A THREAT TO THE HEALTH AND SAFETY OF OTHERS. 9

Conclusion 11

Appendix

Fifth Circuit Opinion 1a

District Court Ruling 20a

District Court Opinion 21a

District Court Judgment 29a

Transcript Excerpts 31a

TABLE OF AUTHORITIES

Page

Cases

Bledsoe v. Palm Beach County Soil and Water Conservation Dist., 133 F3d 816 (11th Cir 1998) 10

Coolbaugh v State of Louisiana, 136 F3d 430 (5th Cir 1998). 1

Love v. Westville Correctional Center, 103 F3d 558, 559 (7th Cir 1996) 8, 9

School Board of Nassau County v Arline, 480 US 273 (1987) ..... i, 10

Rules and Regulations

28 CFR Pt 35, App A, §35.104 4

28 CFR Pt 35, App A 10

28 CFR §35.130(b)(6) 2, 7

28 CFR §35.130(b)(7) 2

28 CFR §35.130(b)(8) 2

Statutes

28 USC §1254(1) 1

29 USC §794 10

42 USC §12131(2) 1

42 USC §12132 ..... 1, 7, 9

42 USC §§12131 12

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is set out at *Coolbaugh v State of Louisiana*, 136 F3d 430 (5th Cir 1998). The judgments of the United States District Court for the Western District of Louisiana, Alexandria Division, are set forth in the Appendix (1a-3a). The Court of Appeals affirmed the lower court's denial of summary judgment to Stafford Coolbaugh and affirmed the entry of judgment on a jury verdict in favor of the State.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 USC §1254(1). The Court of Appeals issued its opinion in this case on February 27, 1998 and this petition was timely filed within 90 days of the entry of the decision.

STATUTES AND RULES INVOLVED IN THIS CASE

42 USC §12132 provides:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity.

42 USC §12131(2) provides:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and

services, meets the essential eligibility requirements for the receipt
of services or the participation in programs or activities provided by a public entity.

28 CFR §35.130(b)(6) provides:

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability.

28 CFR §35.130(b)(7) provides:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 CFR §35.130(b)(8) provides:

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

28 CFR §35.150(a) provides:

> A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not --
>
> * * * *
>
> (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial or administrative burdens, a public entity has the burden of proving that compliance with §35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alterations or burdens must be made by the head of a public entity or his or her designee after considering all the resources available for use in the funding and operation of the service, program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens, but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

28 CFR Pt 35, App A, §35.104 - Definitions, provides:

A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. In School Board of Nassau County v Arline, 480 U.S. 273 (1987), the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an indivi- dualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures will mitigate the risk. This is the test established by the Supreme Court in Arline. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing

> others to avoid significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

STATEMENT OF THE CASE

Petitioner, Stafford Coolbaugh, filed his complaint on October 7, 1994, alleging discrimination in violation of the Americans with Disabilities Act which the State answered on December 15, 1994, and amended on January 17, 1995, without asserting any affirmative defenses.

On May 16, 1995, Coolbaugh filed a motion for partial summary judgment with the required attachments on the issue of liability to which the State responded on June 2, 1995. The district court denied Coolbaugh's motion for partial summary judgment on August 22, 1995.

On October 30, 1995, the State filed a motion for summary judgment with attachments to which Coolbaugh responded on November 13, 1995. On December 13, 1995, the district court entered its "Ruling" granting the State's motion as to compensatory and punitive damages and denying it as to Coolbaugh's ADA claim. On February 13, 1996, Coolbaugh filed his motion to reconsider the district court's judgment on the issue of compensatory damages to which the State responded on February 23, 1996. On March 19, 1996, the district court reversed its prior judgment and allowed the claim for compensatory damages to proceed and set out the issues for trial.

On June 3, 1996, a jury trial on Coolbaugh's claims was held. At the conclusion of Coolbaugh's case-in-chief,

the State moved for judgment as a matter of law which was denied. The jury verdict against Coolbaugh and for the State was entered on June 18, 1996. Coolbaugh filed his notice of appeal from the final judgment on June 21, 1996. Coolbaugh timely appealed.

The appeal was duly briefed. Prior to oral argument and at the direction of the Court of Appeals, the parties submitted arguments regarding the application of the Eleventh Amendment to the ADA. Oral arguments were made on March 4, 1997.

On February 27, 1998, the Court of Appeals held that the provisions of the ADA were enforceable against the State and Congress acted properly under the Fourteenth Amendment to abrogate the state's Eleventh Amendment immunity. *See Coolbaugh*, 136 F3d at 433-438. The Court of Appeals then summarily affirmed the district court's denial of Coolbaugh's motion for summary judgment and the entry of judgment on the jury verdict against Coolbaugh. *See Coolbaugh*, 136 F3d at 439.

REASONS FOR GRANTING PETITION

I. THE FIFTH CIRCUIT'S OPINION ALLOWS LOUISIANA TO IMPOSE WITHOUT ANY BASIS IN FACT OR LAW CRITERIA FOR OBTAINING A LOUISIANA DRIVING LICENSE ON AN OTHERWISE QUALIFIED INDIVIDUAL WITH A DISABILITY THAT IT DOES NOT IMPOSE ON NONDISABLED INDIVIDUALS.

A. Both in his motion for summary judgment and at trial, Coolbaugh made out a prima facie case of discriminaion, that is, he was a qualified individual with a disability who with a reasonable accommodation (a hand controlled van) could drive, but was denied a license to drive in Louisiana because of his disability. The district court recognized

this in its "Ruling" giving Coolbaugh back his compensatory damages claim [22a]. There were sufficient undisputed material facts brought out in support of Coolbaugh's motion for summary judgment and at trial to make his case either way as far as Louisiana's liability. More importantly, there were no facts presented by the State sufficient to meets its burden on its "necessity" defense.

Coolbaugh was a quadriplegic who when he moved to Louisiana held a valid California driver's license which allowed him to drive a hand controlled vehicle. *See* 136 F3d at 432. Coolbaugh's wife who was not disabled was able to obtain a Louisiana driving license based solely on her valid California driving license and passing an eye test. *Id.* Coolbaugh, on the other hand, was required to take a driver's test and obtain a doctor's opinion stating that Coolbaugh could safely drive before the State would consider issuing him a Louisiana driving license. *Id.* Because he did not take the driving test, Coolbaugh did not get his driving license. *Id.* Coolbaugh had driven safely without any accidents in California from 1979 until January of 1993 [37a-41a]. Because he did not have a van nor access to a hand controlled vehicle, Coolbaugh had not driven after January of 1993 in California or in Louisiana from July of 1993 until he applied for a driving license on July 5, 1994 [38a-41a].

B. A state may not administer a licensing program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability or establish requirements for licensees that subject them to discrimination on the basis of disability. 28 CFR §35.130(b)(6). Louisiana admitted it required Coolbaugh to take a driving test and submit a medical statement from a physician solely because of his disability [20a, 41a-45a]. If a driving test and medical statement was required for every driver applying for a driving license in Louisiana or on just those with a valid out-of-state driving license, there would be no discrimination because all would be treated the same. However, that is not what Louisiana did [20a-36a] and the additional requirements imposed on anyone the examiner judged to be

"disabled" by some undefined standard is discrimination as defined by the ADA. *See* 42 USC §12132.

Contrary to the Court of Appeals' conclusion [136 F3d at 439], there was ample uncontradicted evidence presented in support of Coolbaugh's motion for summary judgment and at trial to prove not only that Louisiana discriminated against Coolbaugh, but did it intentionally and not by reason of mistake, accident, negligence, or other innocent reason. *See Love v. Westville Correctional Center*, 103 F3d 558, 559 (7th Cir 1996). In fact, it was a foregone conclusion according to the district court [22a]. The Court of Appeals' conclusion the jury's verdict was supported by the evidence was erroneous.

C. In explanation of its decision, the Court of Appeals concluded that Coolbaugh had only used his California driving license for identification purposes [Id. at 439] and suggested by implication without citing any authority that the State could deny an individual with a disability a license to drive based on a valid out-of-state license if the individual had not driven or, perhaps, had not driven enough while having a valid license.

Since there is no requirement in Louisiana for nondisabled individuals to have driven on a valid out-of-state license prior to applying for a Louisiana driving license based on a valid out-of-state license, it is not possible for this to be anything but discrimination based on a disability. To the State's credit and side stepping the question of how much or little an indivi- dual must have driven in the foreign state, the State never made this assertion. The Court of Appeals simply found something that did not exist in an attempt to provide some basis for affirming the district court. To the extent that the Court of Appeals' decision rests on the fiction that Coolbaugh had only used his California driving license for identification purposes or had to have driven using it for some amount of time, the decision is erroneous and should be reversed.

II. LOUISIANA DID NOT MAKE THE INDIVIDUALIZED INQUIRY REQUIRED BY SCHOOL BOARD OF NASSAU COUNTY, FLORIDA V. ARLINE WHEN IT REQUIRED APPELLANT TO ESTABLISH BY A DRIVING TEST AND A MEDICAL STATEMENT THAT HE WAS NOT A THREAT TO THE HEALTH AND SAFETY OF OTHERS.

To further justify its decision, the Court of Appeals said that the State could not have discriminated against Coolbaugh since the State did not "desire to discriminate against him because of his disability;" instead, "it's decision was motivated by a desire to protect the public on the state's highways." *Id.* at 439. First of all, "motivation" is not an element of an ADA discrimination claim or a defense to a claim. *See Love, supra*, 103 F3d at 560 *and* 42 USC §12132. Even if wanting to protect the public was a consideration, there was no evidence offered by the State or even inadvertantly by Coolbaugh showing that Coolbaugh was not competent to drive or had ever had a driving problem and was a danger to anyone in Louisiana, California or anywhere else.

The Court of Appeals overlooked the fact that the State had failed to meet its required burden of proof as to the "direct threat" posed by Coolbaugh and had failed to prove it made an individualized inquiry when promulgating its "rules" and later when it applied those rules to Coolbaugh. The district court in its "Ruling" had expressly referred to the State's having to prove at trial whether the State's additional requirements for the disabled were "necessary" [22a-24a]. After finding as a matter of law that the State did discriminate against Coolbaugh because of his disability, the court said:

> [T]he parties' primary task at trial will be to address whether the additional eligibility requirement [sic] imposed on disabled persons are "necessary" to the driver's license renewal

> program and whether they "can properly be considered 'essential' eligibility requirements." *Id.*

When the district court referred to "necessity" and "necessary," it was actually referring to "direct threat" as discussed in 28 CFR Pt 35, App A - Definitions [Appendix, Exh C]. This, in turn, is nothing more than a rephrasing of this Court's test in *School Board of Nassau County v Arline*, 480 US 273 (1987), which addressed the question of whether an individual with a disability is qualified if the individual represents a significant risk to the health or safety of others if allowed to participate in the activity at issue. While *Arline* was an employment case under Section 504 of the Rehabilitation Act of 1973, 29 USC §794, and the individual with a disability had a contagious disease, the principles involved are applicable to the ADA and, perhaps, to Title II which deals with government programs and services including employment. *See Bledsoe v. Palm Beach County Soil and Water Conservation Dist.*, 133 F3d 816 (11th Cir 1998). In any event, the district court applied it to Coolbaugh's case and the State did not object.

In *Arline*, this Court said that an individualized inquiry with appropriate findings was necessary to protect individuals with disabilities from deprivations based on prejudice, stereotypes, or unfounded fear while giving appropriate weight to such legitimate concerns as avoiding exposing others to significant health and safety risks. 480 US at 287. Without an appropriate inquiry, the disabled would be vulnerable to discrimination on the basis of mythology and false assumptions which is "precisely the type of injury Congress sought to prevent." *Id.* at 286.

Most likely, the error committed by the Court of Appeals was in basing its decision on the same prejudices, stereotypes and unfounded fears Congress sought to eliminate and either not discovering or simply ignoring the fact that there was no evidence of an individualized inquiry as required by the district court and its final instruction and by *Arline* into whether Coolbaugh was qualified to drive and no

evidence, in any event, that Coolbaugh represented a danger to others. The danger was just assumed by the State [41-43a)] based on preconceived notions regarding his disability despite uncontradicted evidence he had driven safely in California for years [37a-38a].

The question was also never addressed at trial with any evidence whether the Louisiana statutes, regulations and practices upon which the State relied were "necessary" criteria based on reasonable facts instead of prejudice, stereotypes, or unfounded fear of individuals with disabilities. To the extent the decision of the Court of Appeals relies on the unproven defense that Coolbaugh and the disabled were a direct threat to the health and safety of others and the additional requirements were necessary, the decision is erroneous and should be reversed.

CONCLUSION

For the reasons set out above, the Court should grant certiorari, reverse the Fifth Circuit Court of Appeals, order judgment to Petitioner on the issue of liability, and remand this matter for trial on the issue of damages.

Respectfully submitted,

John Emry, 8360-49
Attorney for Petitioner
62 W. Jefferson Street
Franklin, IN 46131-2311
Telephone: 317-736-5800
FAX: 317-736-6070

(Footnotes Trail Opinion)

REVISED, March 25, 1998

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-30664

STAFFORD J. COOLBAUGH,

Plaintiff - Appellant,

VERSUS

STATE OF LOUISIANA,

Defendant - Appellee.

Appeal from the United States District Court
For the Western District of Louisiana

February 27, 1998

Before DAVIS, SMITH and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:

Stafford J. Coolbaugh, a quadriplegic, filed this action against the State of Louisiana in federal court alleging that the State violated Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (1994), by discriminating against him on the basis of his disability. The district court denied Coolbaugh's motion for summary judgment and the jury eventually returned a verdict in favor of the State. Coolbaugh has appealed the district court's denial of his summary judgment motion, as well as the take nothing judgment entered on the jury's verdict. Before turning to the merits, we consider whether jurisdiction was proper. Specifically, we consider whether the ADA represents an appropriate Congressional exercise of its Section 5 enforcement power so as to override the State of Louisiana's Eleventh Amendment immunity. In light of the Supreme Court's decisions in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), City of Boerne v. Flores, 117 S. Ct. 2157 (1997), and City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), we hold that the provisions of the ADA are enforceable against a state because the enactment of this legislation was a valid exercise of Congress' Section 5 enforcement power, and for that reason does not infringe upon Louisiana's rights under the Eleventh Amendment. On the merits, we find no error and affirm.

I.

Coolbaugh and his family moved to Louisiana in 1993 after living in California for many years. While he was a California resident, Coolbaugh received a driver's license permitting him to operate a specially equipped, hand-controlled automobile. Coolbaugh's testimony revealed that he had used his California license for identification purposes, but not to drive. Upon their arrival in Louisiana, Coolbaugh and his

wife went to the local Office of Motor Vehicles to obtain Louisiana driver's licenses.

Generally, a new Louisiana resident may obtain a Louisiana driver's license by presenting a valid out-of-state license and passing an eye exam. Coolbaugh's wife, who was not disabled, followed this procedure and obtained a Louisiana driver's license. An employee of the Office of Motor Vehicles told Coolbaugh, however, that in addition to the usual requirements, he must complete a special medical form and pass a road test in his own hand-controlled vehicle. Although Coolbaugh's doctor certified that Coolbaugh could safely drive a "handicapped controlled vehicle," Coolbaugh failed to supply his own hand-controlled vehicle or otherwise to take and pass the required road test. As a result, Louisiana declined to issue Coolbaugh a Louisiana driver's license.

Coolbaugh brought the current action against the State of Louisiana in federal court alleging that the State violated Title II of the ADA by treating him and his nondisabled wife differently with respect to the issuance of Louisiana driver's licenses. The district court denied Coolbaugh's motion for summary judgment, and the case proceeded to trial. The jury returned a verdict in favor of Louisiana, finding that the State had not discriminated against Coolbaugh on the basis of a disability. Coolbaugh appeals both the district court's denial of his motion for summary judgment and the jury's verdict.

II.

The Eleventh Amendment provides immunity to states from suits in federal court by private persons. The Eleventh Amendment states that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has broadly construed the Eleventh Amendment's narrow language, to embrace the larger principle that a state is granted immunity from suits initiated by private entities or persons in federal court, if the state has not consented to such suits. Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1122 (1996) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.") (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).

Congress has the authority to abrogate states' immunity in certain circumstances pursuant to Congress' powers under Section 5 of the Fourteenth Amendment. Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Among the provisions is Section 1's mandate that

> [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id., § 1.

Seminole Tribe established a two-pronged test for determining the validity of Congress' abrogation of state immunity through the exercise of its Section 5 enforcement power. First, a court must determine whether Congress "unequivocally expresse[d] its intent to abrogate the immunity." 116 S. Ct. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)). Second, a court must determine whether Congress acted "pursuant to a valid exercise of power." Id. (quoting Green, 474 U.S. at 68).

The first prong--Congress' intent to abrogate state immunity--is patently clear in the ADA. Section 12202 of the ADA provides that "[a] State shall not be immune under the eleventh amendment [sic] to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. See also Clark v. California, 123 F.3d 1267, 1269 (9th Cir. 1997) (finding that in the ADA, Congress "unequivocally expressed its intent to abrogate the State's immunity").

The second prong--whether Congress has abrogated state immunity in the ADA through a valid exercise of its enforcement power--is less clear. The Constitution allows Congress to enforce the Fourteenth Amendment, and the Supreme Court held in City of Cleburne, Texas v. Cleburne Living Center, Inc. that disabled persons are protected by the Equal Protection Clause.(1) 473 U.S. 432, 450 (1985).

In Cleburne, the City of Cleburne denied a special use permit to a proposed operator of a group home for the mentally retarded. Id. at 435-37. The plaintiffs challenged the denial, arguing that the zoning ordinance requiring a permit violated the equal protection rights of the mentally retarded. Id. at 437. The Supreme Court held that "legislation that distinguishes between the mentally retarded and others must be

rationally related to a legitimate governmental purpose." Id. at 446.

Thus, applying Cleburne, the disabled are protected by the Equal Protection Clause and Congress is entitled to enforce this protection against the states despite the Eleventh Amendment. The Court last term, however, in City of Boerne v. Flores, declared that Congress' power in this respect is not unlimited. 117 S. Ct. 2157 (1997).

Flores arose out of the City of Boerne's rejection of the Archbishop of San Antonio's permit application to enlarge a historically significant church. Id. at 2160. The Archbishop brought an action claiming, among other things, that rejection of the permit violated The Religious Freedom Restoration Act of 1993 ("RFRA"). 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)). The Court held that RFRA, legislation passed pursuant to Congress' enforcement power under Section 5 of the Fourteenth Amendment, was unconstitutional because it exceeded Congress' enforcement power. Flores, 117 S. Ct. at 2172.

The Flores Court declared that "§ 5 is 'a positive grant of legislative power' to Congress." Id. at 2163 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). The Flores Court restated its longstanding view that

> [w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or

> invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 2163 (quoting Ex parte Virginia, 100 U.S. 339, 345-46 (1879)). The Flores Court affirmed the historical principle that Congress has the authority to both remedy and prevent constitutional violations. Id. at 2164-67. In addition, the Court restated its historical view that

> [l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'

Id. at 2163 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). In contrast to its affirmation of Congress' Section 5 powers, the Court was clear in its mandate that Congress may not "determine what constitutes a constitutional violation." Id. at 2164.

The Flores Court explained Congress' Section 5 authority to adopt legislation that remedies or prevents constitutional violations by reciting examples from earlier cases. Id. at 2166-67. For example, the Supreme Court "upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment . . . to combat racial discrimination in voting." Id. at 2163 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)) (citation omitted). The Court upheld this legislation to prevent violations despite its earlier decision upholding the constitutionality of the literacy tests in

Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). The Supreme Court has "also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States." Flores, 117 S. Ct. at 2163.

In Flores, the Court stated that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." Id. at 2164. The Court held that to be a valid exercise of power under Section 5, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. (emphasis added). As guidance to applying this test, the Court stated that "[t]he appropriateness of remedial measures must be considered in light of the evil presented." Id. at 2169 (citation omitted).

In summary, the Supreme Court has instructed us that Congress is authorized to adopt legislation that remedies or prevents unconstitutional conduct, provided there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. at 2164. This proportionality inquiry has two primary facets: the extent of the threatened constitutional violations, and the scope of the steps provided in the legislation to remedy or prevent such violations.

In making our proportionality review, as Flores directs, we must consider the ADA's scope in light of the evil it addresses. We first turn to findings in the ADA where Congress detailed its understanding of the extent of the evil it was addressing--discrimination against the disabled.(2)

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an

inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.(3)

42 U.S.C. § 12101 (a) (1995).

We must give these congressional findings substantial deference. "In reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.'" Turner Broad. Sys., Inc. v. FCC (Turner II), 117 S. Ct. 1174, 1189 (1997) (quoting Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 665 (1994) (Kennedy, J. Op.)).

The Court in Flores reaffirmed this bedrock principal when it stated that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." 117 S. Ct. at 2172 (quoting Morgan, 384 U.S. at 651).

The Turner II Court instructs that the judiciary's "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" 117 S. Ct. at 1189 (quoting Turner I, 512 U.S. at 666 (Kennedy, J. Op.)).

Deference to the judgment of Congress is particularly appropriate in this case, because in Cleburne, the Court identified Congress as the ideal governmental branch to make findings and decisions regarding the legal treatment of the disabled. 473 U.S. at 442-43. In Cleburne, the Court stated: "How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." Id.

Before enacting the ADA, Congress considered a wide range of evidence and made findings. Both the House and the Senate cited seven substantive studies or reports to support its conclusion that discrimination against the disabled is a serious and pervasive problem. S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, pt. 2, at 28 (1990) (Both citing National Council on the Handicapped, On the Threshold of Independence (Jan. 1988) (updating the legislative changes recommended in Toward Independence); Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic (June 1988) (reviewing the medical, financial, ethical, policy, and legal issues that affect those afflicted with HIV); Louis Harris and Associates, The ICD (International Center for the Disabled) Survey II: Employing Disabled Americans (1987) (surveying 210 top managers, 301 equal employment managers, 210 department heads and line managers, and 200 top managers in companies employing 10-49 people); Louis Harris and Associates, The ICD (International Center for the Disabled) Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream (March 1986) (surveying 1000 disabled persons); National Council on the Handicapped, Toward Independence (Feb. 1986) (reviewing different laws and programs that affect disabled persons and offering recommendations for legislative changes); U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (Sept. 1983) (reporting on, among other things, the history, nature, and extent of discrimination against the disabled); From ADA to Empowerment: The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities (Oct. 12, 1990) (compiling findings and recommendations following the formation of a Task Force, which conducted 14 Washington, D.C., teleconference meetings with participants from across the country, held 63 public forums in the 50 states and some

territories, held other meetings involving 25,000 participants, testified in congressional hearings, met with legislative and executive staff members, met with the President, Vice President and various Cabinet members, and met with opponents of the ADA)). The legislative history also includes a wealth of testimonial and anecdotal evidence from a spectrum of parties to support the finding of serious and pervasive discrimination.(4)

We are satisfied that the extensive record compiled in the legislative history fully supports Congress' detailed findings of a serious and pervasive problem of discrimination against the disabled. As stated above, these findings are entitled to deference. Because Congress found a significant likelihood of unconstitutional actions and therefore a significant "evil" to be addressed, the only remaining inquiry is whether the scope of the ADA is so "sweeping" that the statute cannot be seen as proportional to the evil Congress sought to address.

We are persuaded that Congress' scheme in the ADA to provide a remedy to the disabled who suffer discrimination and to prevent such discrimination is not so draconian or overly sweeping to be considered disproportionate to the serious threat of discrimination Congress perceived. The ADA first sets forth broad provisions generally outlawing discrimination.(5)

In addition to these general provisions outlawing discrimination, Congress made specific judgments in particular circumstances as to what it perceived to be reasonable and appropriate to prevent unconstitutional discrimination. For example, in Title I, 42 U.S.C. § 12112(b)(5)(A) declares it discriminatory to reject an employee whose mental or physical limitation may be reasonably accommodated, so long as such accommodation does not cause undue burden;

§ 12112(d) declares it discriminatory to subject a potential employee to medical examinations or inquiries; and § 12113 provides a defense to an entity that refuses employment to a disabled person when the refusal is "job-related and consistent with business necessity." Included in the provisions of Title II is 42 U.S.C. § 12142(a), which requires entities that purchase or renovate new buses or rail vehicles to ensure that such new or renovated vehicles be accessible to the disabled, and 42 U.S.C. § 12148(b), which requires that at least one car per train is accessible to the disabled. Congress made these particularized judgments after hearing testimony on the reasonableness and feasibility of these provisions. See, e.g., H.R. Rep. No. 101-485, pt. 2, at 44-45 (1990) (citing testimony that businesses will benefit from the ADA because the labor pool will improve); id. at 45 (citing employee expertise and performance benefits that accrue to corporations that make accommodations); id. (citing testimony from a former CEO of small and large companies, arguing that the ADA is affordable and is "good business"); id. at 46 (citing testimony regarding the Marriott Corporation's success as a result of policies similar to those established in the ADA).

In sum, the ADA represents Congress' considered efforts to remedy and prevent what it perceived as serious, widespread discrimination against the disabled. We recognize that in some instances, the provisions of the ADA will "prohibit[] conduct which is not itself unconstitutional and intrude[] into 'legislative spheres of autonomy previously reserved to the States.'" Flores, 117 S. Ct. at 2163 (quoting Fitzpatrick, 427 U.S. at 455). We cannot say, however, in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the Flores proportionality test for legislation that provides a remedy for unconstitutional discrimination or prevents threatened unconstitutional actions.

In concluding that Congress did not exceed its Section 5 power in adopting the ADA, we join the only other circuit that has considered the issue since the Court decided Flores. In Clark, the Ninth Circuit upheld the constitutionality of the ADA as a proper exercise of Congress' Section 5 power. 123 F.3d at 1270. The panel concluded that

[i]n both acts, Congress explicitly found that persons with disabilities have suffered discrimination. Both the ADA and the Rehabilitation Act therefore are within the scope of appropriate legislation under the Equal Protection Clause as defined by the Supreme Court. At the same time, neither act provides remedies so sweeping that they exceed the harms that they are designed to redress.

Id. For these reasons, the Ninth Circuit concluded that "both the ADA and the Rehabilitation Act were validly enacted under the Fourteenth Amendment." Id.

Congress' inclusion of detailed findings in the ADA is an important distinguishing feature between this case and Flores. In contrast to the extensive findings Congress made in the ADA, Congress made no findings in RFRA of widespread unconstitutional treatment of religious persons. Indeed, the Flores Court concluded that "the emphasis of the hearings [related to RFRA] was on laws of general applicability which place incidental burdens on religion." Flores, 117 S. Ct. at 2169. The detailed factual findings in the ADA, which require our deference, are critical to the application of the Flores proportionality review.

Also, we are convinced that the threat posed by RFRA to our principles of separation of powers is not similarly posed by the ADA. In the ADA, Congress included no language attempting to upset the balance of powers and usurp the Court's

function of establishing a standard of review by establishing a standard different from the one previously established by the Supreme Court. Congress performed one of its traditional legislative functions by finding facts relating to proposed legislation. The Supreme Court may in the future, if it chooses to do so, reconsider the Cleburne standard of review in light of the Congressional findings. However, this conflict is not a sufficient reason for us to invalidate the ADA.

The dissent seems to conclude that Congress does not have the power under § 5 to prohibit constitutional conduct. We disagree. The Flores court stated

> [l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'

Id. at 2163 (quoting Fitzpatrick, 427 U.S. at 455).

We therefore hold that the ADA represents a proper exercise of Congress' Section 5 enforcement power under the Fourteenth Amendment. As a result, Louisiana is not entitled to Eleventh Amendment immunity from suits brought pursuant to the ADA.

III.

We now turn to the merits. The record fully supports the jury's finding that the state did not discriminate against Mr. Coolbaugh, who was a paraplegic, by requiring that he demonstrate his ability to drive on the state's roadways by taking a driving test. A number of plausible explanations may be offered for the verdict. Perhaps the clearest one that is fully supported by the evidence is that the state's refusal to issue Mr. Coolbaugh a driver's license based on his possession of a California license was not motivated, even in part, by its desire to discriminate against him because of his disability. Rather, its decision was motivated by a desire to protect the public on the state's highways. Mr. Coolbaugh's argument that, absent discrimination, the state would have accepted his California driver's license as sufficient evidence of his ability to drive was particularly unpersuasive. The evidence revealed that though Coolbaugh held a valid California driver's license, he had not actually driven a vehicle since obtaining his license, and had used the license only for identification purposes. Because the verdict is fully supported by the record and we find no reversible error, the judgment of the district court is affirmed.

AFFIRMED.

1. We recognize that Cleburne specifically addressed the mentally disabled, and not the physically disabled. However, we are persuaded that its reasoning applies to the physically disabled as well. In arguing against extension of heightened scrutiny to mentally disabled individuals, the Court pointed out the difficulty of "distinguish[ing] a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." Cleburne, 473 U.S. at 445. The Court then listed such indistinguishable

groups, naming "the aging, the disabled, the mentally ill, and the infirm." Id. at 446. Rejecting the eligibility of these groups for heightened scrutiny, the Court stated, "[w]e are reluctant to set out on that course, and we decline to do so." Id. This assignment of rational basis review to physically disabled persons has been recognized and applied by numerous courts after Cleburne. See Hansen v. Rimel, 104 F.3d 189, 190 n.3 (8th Cir. 1997) ("Although protected by statutory enactments such as the [ADA], the disabled do not constitute a "suspect class" for purposes of equal protection analysis."); Suffolk Parents of Handicapped Adults v. Wingate, 101 F.3d 818, 824-27 (2d Cir. 1996) (applying rational basis standard to claims of handicapped individuals who challenged a state's denial of funding), cert. denied, 117 S. Ct. 1843 (1997); Does v. Chandler, 83 F.3d 1150, 1155 (9th Cir. 1996) ("For the purposes of equal protection analysis, the disabled do not constitute a suspect class."); Spragens v. Shalala, 36 F.3d 947, 950 (10th Cir. 1994) (holding that "a classification applying to blind persons is not suspect, or even quasi-suspect, and we therefore apply the 'rational basis' standard, rather than some more strict one"); More v. Farrier, 984 F.2d 269, 271 (8th Cir.), cert. denied, 510 U.S. 819 (1993) (holding that the wheelchair-bound are not a suspect class).

2. The findings in the ADA distinguish it from RFRA, 42 U.S.C. §§ 2000bb to 2000bb-4, in which Congress made no specific findings regarding the seriousness or the scope of discrimination against religious persons.

3. The principal findings regarding the existence of discrimination are listed above. Congress also found:

> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a

> history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;
>
> (8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
>
> (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a) (1995).

4. See, e.g., S. Rep. No. 101-116, at 6 (1989)(quoting the testimony of Timothy Cook of the National Disability Action Center, regarding the mentally and emotionally debilitating effects of discrimination); id. at 6-7 (quoting the testimony of Judith Heumann of the World Institute on Disability, regarding her personal history of discrimination due to her disability); id. at 7 (citing a Washington Post article in March, 1988, profiling a zoo keeper's refusal to admit children with Downs Syndrome); id. at 8 (citing testimony about a Kentucky

woman who was fired because her son, ill with AIDS, moved into her home so she could provide care for him); id. at 7 (citing the discrimination apparent in the facts of Alexander v. Choate, 469 U.S. 287 (1985), in which a child with cerebral palsy was excluded from the classroom because the teacher believed the child's appearance nauseated classmates); id. at 9 (citing the testimony of U.S. Attorney General Dick Thornburgh (on behalf of President Bush), profiling the isolation and dependence faced by the disabled); id. at 10 (citing the testimony of Harold Russell, Chair of the President's Committee on Employment of People with Disabilities, that a majority of disabled persons require no reasonable accommodation, and many others require only an inexpensive one); id. at 12 (citing testimony regarding the inaccessibility of many polling places to disabled persons).

5. Title I and Title II each contain a broad mandate. See, e.g., 42 U.S.C. § 12112(a):

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

See also 42 U.S.C. § 12132:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

STAFFORD J. COOLBAUGH

CIVIL ACTION NO. 94-1841

-vs-

SECTION "A" (JUDGE LITTLE)

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, OFFICE OF MOTOR VEHICLES

RULING

This court DENIES plaintiff's motion for partial summary judgment. Our review of the record uncovers too many genuine disputes of material fact for summary judgment to be appropriate at this time.

Alexandria, Louisiana

22 August 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

STAFFORD J. COOLBAUGH

CIVIL ACTION NO. 94-1841

-vs-

SECTION "A" (JUDGE LITTLE)

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, OFFICE OF MOTOR VEHICLES

RULING

In a ruling issued 12 December 1995, this court denied defendant's motion for summary judgment as to the merits of plaintiff's claim under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 to 12134, but granted defendant's motion for summary judgment as to plaintiff's request for punitive and compensatory damages for mental anguish and suffering. While the plaintiff concurs with our ruling as to punitive damages, he asks that we reconsider our ruling as to the availability of compensatory damages under Title II of the ADA. Having considered the caselaw discussed in plaintiff's memorandum, we acknowledge the error in our previous ruling and thus grant the plaintiff's Motion to Reconsider Judgment on Issue of Compensatory Damages.

RECEIVED
MAR251996
BY:_____

I

There is no need for a detailed review of the factual basis of this suit. Suffice it to say that plaintiff, Stafford J. Coolbaugh, has alleged that the extra eligibility criteria imposed by the State of Louisiana's Office of Motor Vehicles on disabled persons seeking to replace a valid unexpired out-of-state driver's license with a Louisiana license violates 42 U.S.C. § 12132 which prohibits qualified individuals with a disability from being denied the benefits, services, programs or activities of a public entity or being subjected to discrimination by any such entity. In order to establish his claim, plaintiff must demonstrate (1) that he is a qualified individual with a disability, (2) that he was excluded from participation in or denied the benefits of the State's driver's licensing program or was otherwise discriminated against by the State, and (3) that such exclusion, denial of benefits or discrimination was by reason of the plaintiff's disability. Tyler *v.* City of Manhattan, 849 F.Supp. 1429, 1439 (D.Kan 1994)

Because the State does not dispute that it imposed additional eligibility requirements on the plaintiff and thus discriminated against him by reason of his disability, the sole issue for trial will be whether the plaintiff is a "qualified individual with a disability," that is, "an individual with a disability who, with or without reasonable modifications to rules, policies or practices . . . or the provision of auxiliary aids or services, meets the *essential eligibility requirements* for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (emphasis added); see also 28 C.F.R. § 35.104 at 439 (1995). The State contends that plaintiff is not such a qualified individual because although he might satisfy the standard eligibility requirements for replacing a valid out-of-state

driver's license with a Louisiana license, he must also satisfy the additional eligibility requirements (of obtaining medical certification *and* passing a road test with a hand controlled vehicle of his own furnishing) that the State deems to be "essential" for a disabled person to obtain the same result.

In light of the ADA's prohibition against the use of eligibility criteria that "screen out an individual with a disability or any class of individuals with a disability from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program or activity being offered," 28 C.F.R. § 35.130(b) (8), the parties' primary task at trial will be to address whether the additional eligibility requirement imposed on disabled persons are "necessary" to the driver's license renewal program and whether they "can properly be considered 'essential' eligibility requirements." Coleman v. Zatechka, 824 F.Supp. 1360, 1368 (D.Neb. 1993)

. This inquiry, of course must be an "individualized assessment" taking into account the specific circumstances of plaintiff's disability, justifications based on generalized stereotypes, presumptions, and fears about what individuals with disabilities can or cannot do will not avail the State. Id., at 1369; 28 C.F.R Pt. 35, App. A., Subpart B. at 458-461.[1]

---

[1] The court recommends for the parties' consideration the following interpretation of the ADA's prohibition on discrimination in eligibility criteria:

> A public entity may, however screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. *Examples of safety qualifications that would be justifiable in appropriate circumstances*

II

Turning to the issue of the availability of compensatory damages, we note first that plaintiff agrees with our earlier ruling insofar as we observed that the remedies set forth in §505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794a) are the remedies provided by Title II of the ADA. 42 U.S.C. § 12133. Section 505, in turn, is divided into two parts. The first part, 42 U.S.C. § 794a(a)(1) provides that the remedies available to 'plaintiffs whose claims arise in the employment context are :hose available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq The second part, 42 U.S.C. § 794a(a) (2), makes available to "any person aggrieved by any act or failure to act by any recipient of federal assistance" under §504 of the Rehabilitation Act (42 U.S.C. § 794) the rights, remedies and procedures available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. . Although Title II of the ADA does not distinguish between the two parts, it is logical to conclude that Congress intended for § 794a(a) (2) to apply since § 794a(a) (1) is geared toward plaintiffs in the employment context. Thus, we look to 42 U.S.C. §2000d, et seq. (Title VI) for the remedies available in this case. As both parties note, however, Title VII does not contain a remedies provision .

> *would include eligibility requirements for drivers' licenses . . . Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.*

28 C.F.R. Pt. 35, App. A. at 461 (1995) (emphasis added) and the district court's well reasoned decision in Coleman v. Zatechka, 824 F.Supp. 1360 (D.Neb. 1993) .

Defendant would have us end our analysis here and conclude that Congress' apparent silence on the availability of compensatory damages evidences an intent to limit damages available to Title II plaintiffs to those forms of equitable relief we enumerated in our earlier ruling. Defendant buttresses this position by noting that in the Civil Rights Act of 1991 Congress expressly amended Title I of the ADA by providing for the award of compensatory and punitive damages and for a jury trial while remaining silent about relief obtainable under Title El. See 42 U.S.C. § 1981 (a) (2) & (c) .

Defendant also observes that it would not necessarily be inconsistent for Congress to have intended different remedies for Title I and Title II plaintiffs in light of the fact that Congress has not structured the titles' enforcement mechanisms identically. Defendant notes, for example, that only Title I requires the exhaustion of administrative remedies.

As plaintiff correctly points out, however, recent Supreme Court jurisprudence dictates that we cannot conclude our analysis here. In Franklin v. Gwinnet County Public Schools, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), the Supreme Court, in holding that compensatory damages are available under Title IX and Title VI of the Civil Rights Act of 1964, provided a three step analysis that courts must follow in determining the range of a plaintiff's remedies under a statute that provides for a private right of action but that does not specify the relief obtainable.

First, if a court determines that a statute provides a private cause of action, the court must "presume the availability of all appropriate remedies" in order "to make good the wrong done." 112 S.Ct. at 1032, 117 L.Ed.2d at

217. In the present case, defendant does not and cannot contest the court's assumption that Congress has authorized an implied right of action under Title II of the ADA. See 42 U.S.C. § 12133; 29 U.S.C.794a; 42 U.S.C. § 2000d-7 (abrogating 11th Amendment immunity for suits against states under Civil Rights Act of 1964). Hence, we must presume that the full range of equitable and monetary remedies are available to the plaintiff.

Second, we must inquire whether Congress intended to limit the remedies available under Tittle II. Franklin, 112 S.Ct. at 1036-37, 117 L.Ed.2d at 220-22. The only evidence defendant could assert to support the contention that Congress did intend to limit the remedies available under Title II would be Congress' silence as to the relief obtainable under that statute when it expressly amended Title I of the ADA to provide for compensatory and punitive damages in the Civil Rights Act of 1991. See 42 U.S.C. § 1981(a) (2). Mere silence, however, is not enough to overcome the strong presumption that Congress intended all appropriate remedies to apply "absent any contrary indication in the text or history of the statute." Franklin, 117 L.Ed.2d at 221 (noting that 42 U.S.C. 2000d-7 (a) (2) 's savings clause provides that traditional remedies both in law and equity are available under Title VI of the Civil Rights Act). Thus, we must also conclude that Congress intended for all appropriate remedies to be available under Title II.

The last step of the Franklin analysis is to ascertain whether the particular remedies sought are "appropriate" in the statutory and factual circumstances of the case. Franklin, 117 L.Ed.2d at 223-24. Those courts which have applied the Franklin analysis to decide what kinds of damages are recoverable under Title VI of the Civil Rights Act, §504 of the Rehabilitation Act or Title II of the ADA have

consistently held that compensatory damages are an appropriate remedy provided intentional discrimination is alleged or proved. See e.g., Tafoya v. Bobroff, 865 F.Supp. 742, 748-50 (D.N.M. 1994), aff'd, 74 F.3d 1250 (10th Cir. 1996) (compensatory damages would have been available for violations of Title II of the ADA, via 42 U.S.C. § 794a(a) (2) (Title VI), if plaintiff had shown intentional discrimination); Lane v. Pena, 867 F.Supp. 1050, 1073 (D.D.C. 1994), aff'd, 1995 WL 418635 (D.C. Cir. 1995), cert. granted, 116 S.Ct. 689, 133 L.Ed.2d 594 (1986) (compensatory damages available under §504 of the Rehabilitation Act against private parties, local counties and any program or activity receiving federal funds, including federal government); Wood v. President of Spring Hill College, 978 F.2d 1214, 1219 (11th Cir. 1992) (compensatory damages available under §504 of the Rehabilitation Act to plaintiffs who prove intentional discrimination or bad faith.); Coleman v. Zatechka, 824 F.Supp. 1360, 1373 (D.Neb. 1993) (plaintiff entitled to recover compensatory damages for feelings of isolation and segregation under §504 of the Rehabilitation Act); Tanberg v. Weld County Sheriff, 787 F.Supp. 970, 973 (D.Col. 1992) (compensatory damages available if plaintiff proves intentional discrimination in violation of §504 of the Rehabilitation Act); f., Tyler v. City of Manhattan, 849 F.Supp. 1442, 1444 (D. n 1994) (distinguishing Tanberg, court held that plaintiff no entitled to compensatory damages for emotional distress in absence of allegation of intentional discrimination); Love . Mcbride, 896 F.Supp. 808, 811 (N.D. End. 1995) (ordering the trial solely on issue of compensatory damages because plaintiff proved intentional discrimination under Title II of ADA).

In the instant case , plaintiff has clearly alleged, and defendant has acknowledged, facts demonstrating that defendant intentionally discriminated against plaintiff.

Indeed, as discussed above, the sole issue for trial is whether the defendant's extra eligibility criteria were a necessary safety precaution in handling plaintiff's application to replace his valid, unexpired out-of-state driver's license with a Louisiana license. Although we observe that injunctive relief ordering the State to elminate the road test requirement may ultimately be the most important remedy available in this case should plaintiff prevail at trial, we must acknowledge that any experience of stigmatization or mental anguish would be compensable if a violation is established. See Coleman, 824 F.Supp. at 1373-74 (awarding plaintiff $1000 in compensatory damages for emotional pain of being isolated and stigmatized by experience of being denied opportunity to have college roommate in violation of Title II of ADA and §504 of the Rehabilitation Act); Love 896 F.Supp. at 811 (plaintiff entitled to jury finding as to damages for emotional or mental harm suffered as a result of intentional violation of Title II of ADA). In short, compensatory damages for emotional pain and mental anguish are an appropriate remedy in this case.

III

In conclusion, we hold that plaintiff is entitled to recover compensatory damages for emotional pain and mental anguish if he proves that defendant intentionally discriminated against him in violation of Title II of the ADA. Accordingly, plaintiff's Motion to Reconsider Judgment on Issue of Compensatory Damages is GRANTED.

Alexandria, Louisiana

19 March 1996

6/17/96

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

STAFFORD J. COOLBAUGH

CIVIL ACTION NO. 94-1841

-vs-

SECTION "A" (JUDGE LITTLE)

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, OFFICE OF MOTOR VEHICLES

JUDGMENT

This action came on for trial before this Court and a jury, on June 3, 1996, the Honorable F. A. Little, Jr., United States District Judge, presiding, and the issued having been duly tried and the jury having duly rendered its verdict; that verdict being that the defendants, State of Louisiana, through the Department of Public Safety and Corrections, Office of Motor Vehicles, did not discriminate against the plaintiff in violation of the Americans with Disabilities act on the basis of a disability.

Considering the foregoing, IT IS ORDERED AND ADJUDGED

That judgment be rendered in favor of the defendants, State of Louisiana, through the Department of Public Safety and Corrections, Office of Motor Vehicles, and against the plaintiff Stafford J. Coolbaugh; and,

VERDICT FORM

1. Did the defendant discriminate against the plaintiff in violation of the Americans with Disabilities act on the basis of a disability?

Yes_____ No_____

If you answered "Yes" to number 1 as to any defendant, proceed to question number 2. If you answered "No," date and sign the Verdict form and return to the courtroom.

2. Did the plaintiff suffer any damages as a consequence of the discrimination in violation of the Americans With Disabilities Act on the basis of disability?

Yes____No_____

If you answered "Yes" to question 2, proceed to question number 3. If you answered ''No,." date and sign the Verdict form and return to the courtroom.

3. What amount of money will fairly compensate the plaintiff for the damages he suffered as a result of the violation of his rights?

Amount $_____

Alexandria, Louisiana
___ June 1996

s/_____
FOREMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Stafford Coolbaugh	•
	•
	•
V.	• Ca. No. 94—1841
	•
	•
State of Louisiana	•

****

Partial proceedings had at Alexandria, Louisiana before The Honorable F. A. Little, Jr., United States District Judge, Western District of Louisiana, and a Jury, beginning at 9:00 A.M. on the 3rd day of June, 1996.

****

APPEARANCES:

William Skye
Attorney at Law
P.0. Box 1982
Alexandria, Louisiana 71309-1982
Counsel for Plaintiff

Randal B. Tannehill
Attorney at Law
Louisiana Department of Justice
P.0. Box 1710
Alexandria, Louisiana 71309
Counsel for State of Louisiana

Q You do not? Would you explain how this happened then with Mr. Coolbaugh?

A We follow department policy for everyone.

Q But isn't the policy to be different for a person in a wheelchair than a person not in a wheelchair?

A As far as the requirement of a medical, yes.

Q How about a person from out of state--

A Yes, we require--

Q --with an out-of-state driver's license?

A If the person is disabled we do.

Q If a person is disabled then - if two people walk into one of your offices, one of them in a - two people come into your office, one of them in a wheelchair and one of them walking, and they both have valid out-of-state driver's license, you issue the driver's license, Louisiana driver's license to the person who is not disabled by passing an eye test, right?

A Yes.

Q But the person who is disabled and who is in a wheelchair, you require him or her to get a medical form filled out verifying that it is safe for him to operate a vehicle in the State of Louisiana, and then you make him pass a road test, is that correct?

A Yes, sir.

Q Okay. Now, I'm going to hand you a document that I have marked Plaintiff Exhibit 5 called Louisiana Driver's Guide, Classes D and E. What is D and E, Classes D and E driver's license?

A Class E is to operate a personal vehicle, Class D is a chauffeur' s license.

Q Class E is the one that everybody normally gets?

A Right.

Q That is the one that Mrs. Coolbaugh had and Mr. Coolbaugh?

A Right.

Q Now, I'm going to hand you this document and I'm going to ask you to read on page 2 the underlined portion only?

A When you become a Louisiana resident you must get a Louisiana driver's license. If you have a valid unexpired out-of-state license, you are only required to take and pass the eye examination.

Q Now, that doesn't say that a person who is not disabled only has to pass an eye test and get a license, does it, it says if you have a valid unexpired out-of-state license you are only required to pass an eye test, it doesn't say anything about disabled or non-disabled persons, does it?

A No, it doesn't.

Q Why wasn't that followed in this case?

A Because we have a policy pertaining to the disabled for issuance of a driver's license.

Q Now, is there any specific provision which says that, any law or regulation?

A A state law.

Q What state law?

A I don't know the statute number off the top of my head.

Q All right. I'm going to show you--

A I think it is 32403.

Q I'm going to show you a document which I have marked as Plaintiff's Exhibit Number 4 and ask you to identify it?

A It is the policy on out-of-state transfers for driver's license.

Q Is that the policy that you have referred to saying that you treat people differently who are from out of state and who are disabled?

A No, sir.

Q All right. Look on page, the second page, and ask you

to read the underlined portion, that is from your own regulations?

A Persons transferring valid non-commercial out-of-state licenses, as exemplified in Louisiana Class E and D, will not be required to take the written or driving examination.

Q Why wasn't that regulation followed?

A There is still a policy concerning people with disabilities as far as the medical.

Q Do you know - is that in this document? Is that regulation in this document?

A Not that particular policy.

Q Do you know where it is?

A It is policy number 23 in the driver's license section.

Q In this section?

A No.

Q Do you have it here?

A I have a copy of it.

Q Is it section - is it section 403.2, 403.2, is that the regulation?

A Of the law?

Q Is that the law you are talking about?

A Right.

Q That is the basis for your contention that disabled persons have to be treated differently under your regulations, is that correct?

A That is correct.

Q That is the basis for your having treated Mr. Coolbaugh different?

A Right.

Q All right. I'm going to read this to you, it says; Every physically handicapped person applying for a license under the provisions of this chapter for the first time shall attach to his application a detailed medical report or a report from an optometrist, it is a visual defect, from a

physician indicating the severity of his disability or limitation which might impair the applicant's ability to exercise ordinary reasonable control in the operation of a vehicle. Now, that is the regulation or the law that you-A Yes, sir.

Q Ms. Rydosz, do you see that that says for the first time?

A Yes, sir.

Q Was Mr. Coolbaugh applying for a license for the first time or was he applying for a Louisiana license in exchange for his valid California license?

A He was applying for a first time Louisiana driver's license.

Q And that is the regulations you say. Now, don't you make everybody who applies for a Louisiana driver's license for the first time do that who is disabled?

A Yes, sir.

Q In other words, if they come in without a driver's license you make them do that?

A Yes, sir.

Q Do you consider that a first time?

A Yes, sir.

Q But if a person from out of state with an out-of-state driver's license, you still consider that they are applying for a license for the first time--

A Yes, sir.

Q --by the fact that they have had their license for years and driven safely in another state?

A Yes, sir.

Q Why don't you require Out-of-state people who are not disabled to take driver's test, how do you

know that just because they are not disabled they are a better driver? Why do they get a driver's license by passing an eye test?

The Court: You have asked her four questions,do you think she ought to get a chance to answer them.

Q Why do you a assume that a non-disabled party who has a valid out-of-state driver's license is a safe driver and can be issued a Louisiana driver's license for the first time?

A You don't know, the policy does not require it.

Q So non—disabled people, that you assume that it is okay to issue them, they are not applying for a license for the first time, they re applying for a Louisiana license in exchange for their foreign license, right?

A Right.

Q Now, is it f fair to say that the DMV treats handicapped people different from non—handicapped people?

A Yes, sir.

Q. You impose more stringent requirements on them than you do the non—handicapped people? Have you had any instructions at all from your superiors in Baton Rouge that training course t at they furnished to all veterans that were there and passed, you know, a fair portion of the test, and then I went with them in a hand controlled vehicle to the DMV to get a learner's permit to where I could go out on the road and train n with them for another two days, and after that I went back to DMV of California with one of their vehicles, took t e driving test, passed it, had already taken the written test prior to get the learner's permit and passed my driver's test and I was issued a valid California driver's license that stipulated I had to drive an automobile with and controls and an automatic transmission.

Q Did the California license, DMV issue you a California driver's license with hand - authorized hand control lever?

A Yes, sir.
Q When was that t?
A 1978.
Q Now, how long g was the original license for?
A Two years.
Q And what happened at the end of the two years?
A I went back tc the Department of DMV on my first day when it expired and showed my license, they took a picture of me and gave me an eye test and then sent me out the door with a license good for four years.
Q And what happened at the end of that four years?
A I received letter from the Department of Motor Vehicles with - if you didn't have any violations or accidents on your license they would send you out a letter and all you had to do was sign it and send it back to them and they would - and within a week they would send you a new license before your other license expired.
Q And they renew your license?
A Yes, sir.
Q Okay. And how often did they renew them?
A It's every four years and probably from '78 to 1990, I don't know how many times that would be, but two years, '80 and '78 and up to 1990 would be approximately three times.
Q During all that time were you ever involved in an automobile accident——
A No, sir.
Q ——in which you were driving?
A No, sir.
Q Did you ever have even a fender—bender?
A No, sir.
Q Was there ever any question about the D.M.V. in California renewing your driver's license?
A No, sir.
Q Now, how did you happen to move to Louisiana?
A My wife and I visited with her sister and her

brother-in—law in 1991, we fell in love with the Toledo Bend Lake area, and in 1992 they called us up and said there is a lot

A Yes, sir.

Q And you attribute all of that to the fact that the DMV

deprived you of a driver's license?

A Yes, sir.

Mr. Skye: I tender the witness.

Examination

By Mr. Tannehill:

Q Mr. Coolbaugh, before we start, do you need to take a break or anything?

A No.

Q All right. I know sometimes it gets tedious going through these things. Mr. Coolbaugh, could you tell me when the last time you owned your own hand controlled vehicle?

A I bought a van in 1979 and sold it to a friend of mine in 1987.

Q You sold it to your friend when?

A I'm sorry, 1987.

Q So from 1987 forward you have not owned a hand controlled vehicle?

A My friend, Art Crattie (phonetically), needed a van with hand controls and I was tired of transferring back and forth in my van, and he had a hand controlled vehicle that he - when he bought my van from me he let me borrow his hand controlled vehicle and I drove that the remainder of the time that I was in California.

Q I just want to clarify. You are saying you sold your van to Mr. Crattie?

A Yes, sir.

Q What year?

A 1987.

Q Do you recall me taking your deposition previously?
A Yes, I do, and in that deposition I--
Q If you would please let me ask the question.
A Okay.
Q And you can answer them when I ask them if you don't mind. Do you recall answering my question in the deposition as to when you sold your hand controlled van, that you told me it was in January of 1993?
A At that time I didn't understand what your question was, and in January of 1993 I took the car back to my friend and said, you know, we are moving.
Q So to clarify that point for all of us here today, the jury, is it your testimony today that from January 1993 you neither possessed your friend's car or your hand controlled van that you previously sold to him?
A Yes, sir.
Q So from January of '93 you had no hand controlled vehicle at your disposal, is that correct?
A Yes, sir.
Q Now, you testified previously that you moved to Louisiana in July of 1993, is that correct?
A That is correct.
Q That is approximately, if my math is okay, seven months from January——
A Yes, sir.
Q ——of '93. Once you moved to Louisiana in July of 1993 did you purchase a hand controlled vehicle while in Louisiana?
A No, sir, I was involved with my wife in building a new home.
Q I understand. Up until the time when you went to the Department of Motor Vehicles Office in Leesville to apply for a Louisiana driver's license for the first time, including that day of July 5th, 1994, did you own or have in your possession a hand controlled vehicle?

A I did not.

Q Now, you said in your testimony previously when Mr. Skye was asking you a series of questions that you felt incarcerated because you did not have a Louisiana license and you couldn't get around. Is that an accurate description of what your testimony was?

A Yes, sir.

Q Now, did this feeling of incarceration start in January
of '93 when you were in California or did this feeling of incarceration really start in July of 1994?

A In July of 1994.

Q So although you had a valid license in California that you were able to use you didn't have a vehicle to get around, is that correct? In the one year and seven months prior to July of 1994 you had a valid California driver's license that would have enabled you to go drive, is that correct?

A Yes, sir.

Q But you didn't drive, did you?

A I was more involved with getting the new home built.

Q I understand. I built a home, I know what you are talking about. But just to clarify, you didn't feel incarcerated until after July of 1994?

A After I had my license revoked, when you go to cash a check and you try - and they want picture I.D., they look at a license and if it is expired they won't accept it. Right there I didn't have any I.D., all I had was an expired California license.

Q Mr. Coolbaugh, did you ever approach the Department of Motor Vehicles to acquire an identification, not a driver's license per se, but simply an identification card so it would help you in cashing checks and the like?

A I applied for a handicapped placard identification.

Q That is not my question. My question is, did you

apply to the Louisiana Department of Motor Vehicles for an

Q --excuse me, to acquire your last four year license that you had from California, did they give you any type of medical examination?

A No, sir.

Q So is it fair to say, based on your testimony, that the only time and the last time that you have had any type of medical examination prior to your visit to Doctor Garland Miller that you have had any type of medical examination or training prior to issuance of a license was back in 1978 before you got your very first hand controlled vehicle license in California?

A Yes.

Mr. Tannehill: No further questions.

Mr. Skye: I just have a few on redirect.

Re—Examination

By Mr. Skye:

Q Mr. Coolbaugh, I'm a little confused about your testimony as to the access to a hand controlled vehicle. You sold your hand controlled vehicle in California when?

A In 1987.

Q Did you have access to a hand controlled vehicle--

A Yes, I did.

Q --from that time on until you moved to Louisiana?

A Yes, I did.

Q Did you have one, did you use a hand controlled vehicle?

A Yes, I did.

Q Where did you get them from?

A Pardon me?

Q Where did you get them from?

A I got it from - the car?

Q Yeah, hand controlled vehicles that you drove?
A Yeah, from Art Crattie.
Q And who is he?
A He is a very good friend of mine that is a quadriplegic
in Nappa, California.
Q How did he happen to have some hand controlled vehicles?
A He had two hand controlled vehicles, he had a Barracuda and an old Chrysler and I borrowed the Barracuda from him and sold him my van. He wanted my van very badly because he couldn't really transfer into either one of his cars very well and he always had to have somebody go with him to fold
up his wheelchair and put it in the back seat.
Q So that you drove a hand controlled vehicle in California up to the time you moved to Louisiana?
A Up to January of '93.
Q That is when you moved to Louisiana?
A That is when I knew I was moving to Louisiana, I returned the car to him.
A I'm looking at you, sir. He was treated differently, yes.
Q You treated him differently because he was handicapped?
A Yes, sir.
Q That is the only reason you treated him differently?
A Yes, sir.
Q You didn't know whether or not Ms. Coolbaugh could operate a vehicle safely on the highways, did you?
A No, sir.
Q But the reason you thought - you suspected he might not is because he was handicapped in a wheelchair?
A Yes, sir.
Mr. Skye: That's all.

The Court: Okay. All right, thank you, Ms. Rydosz.

(Witness excused)

The Court: All right, Mr. Tannehill, do you have someone we can start with?

Mr. Tannehill: Yes, sir, Your Honor, if it please the Court, I would like to call Ms. Dedra Wise to the stand. The Court: Ms. Wise. All right, do you promise to tell the truth, the whole truth, and nothing but the truth?

The Witness: Yes, sir.

The Court: Tell me your name again, please?

By Mr. Skye:

Q And you make that requirement based solely on the fact that they are disabled?
A Yes, by their appearance.
Q By their appearance?
A Uh-huh. (Yes)
Q And you make different requirements for disabled people than you do for n n-disabled people?
A Yes, sir, we did.
Q Have you eve y heard of the Americans With Disabilities Act?
A Yes, sir, I ave.
Q Are you familiar with what it says?
A Yes, sir.
Q Are you familiar with the fact that it says you cannot discriminate against people because of their disability?
A Yes, sir.
Q Do you feel hat you have complied with the act?
A I feel like have complied with what my job required

at that time.

Q In other words, you complied with the state law you feel like, but you admit you discriminated against-

Mr. Tannehill : Objection, Your Honor, the witness hasn't admitted--

Q Do you admit that you discriminated against handicapped

A He wanted t know why he had to get a medical since he already had a valid restricted California license. I explained to him that that was policy, it was not a denial of him getting a license, but it was the procedure that we follow.

Q To your knowledge did you or anyone that you have specific persona knowledge of ever tell Mr. Coolbaugh that he was not going to get a Louisiana driver's license? A No.

Q You simply allowed the procedures and the policies that were in place and asked Mr. Coolbaugh to abide by those policies and procedures?

A That is correct.

Mr. Tannehill: That's all the questions I have, Your Honor.

Mr. Skye: I just have one quick question.

Examination

By Mr. Skye:

Q That procedure is followed for all disabled people, isn't it?

A All disable people, if they have a physical or a mental impairment , we give them a medical.

Q And you don't - if somebody is trying to get a Louisiana license with a valid out-of-state license who is not disabled, you don't require a medical, do you?

A Not unless he can tell that they have a physical

impairment.

Q A disability?

A That's right.

Q In other words, you treat disabled people differently from non-disable people?

A In one sense

Mr. Skye: Thank you.

The Court: All right, thank you. (Witness excused)

Mr. Tannehill: Your Honor, the defense rests.

The Court: All right.

DEFENDANT RESTS:

The Court: Do you have anything, Mr. Skye?

Mr. Skye: No, I have no rebuttal.

The Court: All right. I tell you what we will do, I'm going to ask the jury to go with the Marshal for a minute and we are going to have a couple of little conversations an then we are going to come back here. (Thereupon the jury was excused from the courtroom and the following proceed ings were had out of the presence of the jury)

The Court: All right, I thought we would talk about finishing u . I had thought that it might be so unbearable in he that we were going to have to recess,